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File No. 1245.02

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re Application of: Hall

Examiner: Moy

Serial No.: 09/851995

Art Unit: 3727

Filed: 05/10/01

For: Laundry Basket

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APPEAL BRIEF

20231, on the 13 day of Feb. 2002

Signed

Melvin K. Silverman

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Reg. No. 25,234

Hon. Director of Patents and Trademark
U.S. Patent and trademark Office
Washington, DC 20231

This is an Appeal under 35 U.S.C. §§ 134, 306, and 37 CFR 1.191(a) from the final rejection of claims 4 and 5, all the claims pending in this appeal of the examining attorney's rejection of U.S. Patent Serial No. 09/851995. Applicant Charles Hall is the real party in interest. There are no related Appeals or Interferences in this matter. This Notice of Appeal was filed November 25, 2002.

Fees

The fee of one hundred sixty dollars (\$160.00) associated with the filing of this Appeal Brief, and the amount of four hundred sixty-five dollars (\$465.00) for a three-month extension should be charged to the undersigned attorney's PTO deposit account number 502557. Applicant is a small entity. Applicant is a Small Entity.

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01 FC:2402
02 FC:2253

160.00 CH
465.00 CH

Status of Claims

On September 25th, 2002, Appellant appealed from the final rejections of Claims 4 and 5. Claims 1-3 have been cancelled.

Status of Amendments

No Amendments have been filed since the rejection.

SUMMARY OF THE INVENTION

The instant invention comprises a substantially solid rectangular structure (see Perspective view Fig. 1) including integral vertical side walls 12, formed of a preferably resilient material, such as plastic polymer, and including therewith, for purposes of aeration, a multiplicity of apertures 14, exhibiting an aesthetic geometry. Internally of the solid rectangular structure, there are provided a plurality of co-parallel tracks 26, proportioned for the slidable receipt of substantially vertical partition panels to thereby provide selectively different internal compartments to the hamper/laundry basket 10, for purposes of pre-separation, at the time of insertion of an article of clothing into the hamper, in accordance with any one of a number of criteria, such as dark versus light clothes, clothes requiring outside laundering versus machine washable clothes, and "delicate" articles of clothing versus standard wash types of clothing. The inventive hamper/laundry basket is also optionally provided with a snap-fittable cover 28, which is particularly useful when the laundry basket is employed as a hamper, as opposed to use as a laundry basket. Upon

removal of such the snap-fittable cover 28, laundry may easily be inserted or removed therefrom. The void space defined by said apertures covers between one-third and two-thirds of the area of each sidewall 12, of the structure.

ISSUES

The issues presented upon appeal are as follows:

- 1) Whether the claims recited in the application are unpatentable as being obvious under 35 U.S.C. 103 over Smith (U.S. patent No. 5,072,852) in view of Orefice (U.S. patent No. 5,148,932) and McCarthy (U.S. patent No. 4,867,328), Specifically:
 - a) Whether the combination of Smith with Orifice or McCarthy is analogous art, teaching the selectable creation of one or more separate compartments through the slidable receipt of vertical partitions 28, into the basket;
 - b) Whether the ratio of void space of the apertures 14, to the area of each lateral surface 12, of at least $\frac{1}{3}$ of the area of each said lateral surface which ensures adequate aeration of the laundry within the hamper, is obvious over Smith in light of Orefice or McCarthy;
 - c) Whether Smith, in light of Orefice or McCarthy, teaches that there exists a specific range of area of void space of the apertures of each sidewall that can provide an optimum balance between aeration of the laundry and structural integrity of the sidewalls themselves;

- d) Whether the attachment of a declaration under 37 C.F.R. 1.132 to demonstrate that the selection of the one third ratio of area of the void space of the apertures 14 to total sidewall area of the invention, as more fully described above, is a matter of obvious design choice, particularly inasmuch as none of the references cited by the examiner teach or suggest such a range or even address such a problem.

GROUPING OF CLAIMS

Applicant relies on the allowability of the independent claim for the allowability of the dependent claims.

The Examiner's Rationale:

The Examiner's rationale for the rejection of claims 4 and 5 under 35 U.S.C. 103(a) was delineated in his final rejection:

"Claims 4 and 5 under 35 U.S.C. 103(a) are finally rejected as being unpatentable over U.S. patent number 4,867,328, Sectionized Trash Receptacles, by McCarthy (the '328 patent) since it would have been obvious to provide walls of a container of Figs. 11-20 with any desired number of apertures as taught by figures 2 and 4. Applicants arguments filed 06/07/02 have been fully considered but they are not persuasive. McCarthy shows a rectangular container with removable partitions and apertures in the lateral walls except the claimed range of apertures. In view of *In re Rose*, 105 USPQ 237 (CCPA 1955); *In re Reven*, 156 USPQ 679 (CCPA); *In re Reese*, 129 USPQ 402 (CCPA 1961), any change of size/range and proportion would

be considered as an obvious matter of engineering choice and design as no unexpected and unobvious result is seen. It would have been obvious to one having ordinary skill in the art to choose any desired size/range."

Applicant appeals this decision regarding claims 4 and 5.

ARGUMENT

The ultimate determination of obviousness is a question of law that is reviewed de novo; the factual inquiries upon which that determination is made, however, are binding on the court unless shown to be clearly erroneous. *In re Woodruff*, 919 F.2d 1575, 1577, 16 USPQ2d 1934, 1935 (Fed. Cir. 1990). Such factual determinations include what a reference teaches and whether a reference teaches toward or away from the claimed invention. *In re Bell*, 991 F.2d 781, 784, 26 USPQ2d 1529, 1531 (Fed. Cir. 1993).

The first critical decision on the issue of obviousness, following the introduction of Section 103, was a decision of the United States Supreme Court in *Graham v. John Deere*, 383 U.S. 1 at 17 (1966) where it was stated:

"Under Section 103, *the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved.* Against this background, the obviousness or non-obviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt needs, failure of others, etc, might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness, these inquiries may have relevancy." (Emphasis added).

Claims 4 and 5 of record have been rejected as unpatentable over 35 U.S.C. 103(a) McCarthy.

Applicant does not dispute that Smith, while not relating to a laundry basket or hamper, does relate to an analogous art with respect to the one problem which Applicant's invention addresses. The issue, therefore, is that of the combination of Smith with either of the cited secondary references, namely, Orefice or McCarthy.

The Applicant's invention is not simply one of a hamper or laundry basket in which different types of laundry may be separated at the point of deposit into separate partitions of the hamper. Rather, Applicant's hamper additionally provides for the selectable creation of one or more separate compartments through the slidable receipt of vertical partitions 28 into the basket. Also, Applicant has (see Page 6, T2 of the Specification) discovered that a ratio of void space of the apertures 14 to the area of each lateral surface 12 thereof must be at least one-third of the area of each of said lateral surfaces to ensure adequate aeration¹ of the laundry within the hamper. However, for purposes of structural integrity, this ratio must not exceed two-thirds. Accordingly, as is also noted in the last sentence of Page 3 of the specification, sub-part (b) of original Claim 1, and in original Claim 2, the Applicant's discovery is not simply that a laundry basket may be formed having selectable partitions therein but, as well, that there exists a specific range of area of the void space of the apertures of each sidewall to the total area of each sidewall that can provide an optimum balance

¹It should be noted that the '328 patent teaches nothing concerning aeration.

between aeration of the laundry therein and structural integrity of the sidewalls themselves.

Applicant has amended Line 1 of T2 of Page 6 of the Specification to change the phrase "two-thirds" to --one-third--, this to correct a typographical error, and to render the description of the invention of Page 6 consistent with that of Page 3 and of the original claims.

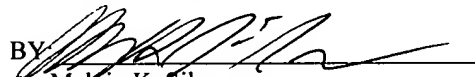
Further, Applicant has amended the claims to integrate the limitations of original Claims 1 and 2 in the form of new independent Claim 4.

Applicant has also attached herewith a declaration under 37 C.F.R. 1.132 to demonstrate that the selection of the above ratio of area of the void space of the apertures 14 to total sidewall area of the invention was not a matter of obvious design choice, particularly inasmuch as none of the references teach or suggest such a range or even address such a problem. That is, each of the secondary references teach the use of small apertures, certainly comprising far less than one-third of the total area of the surface upon which they are provided, the apparent purpose of which is to permit the escape of gas that might otherwise emanate from a trash receptacle.

Even in the absence of the within declaration of Applicant, it is apparent that if the small holes shown in the trash receptacles of Orefice or McCarthy were larger, the underlying purpose of a trash receptacle, namely, that of isolating the trash or garbage from its immediate environment would be defeated. Accordingly, neither Orefice nor McCarthy teach apertures of a size that is sufficient to cause "aeration" of the garbage, because that is not an intended purpose thereof. Further, neither of the secondary references encompass any

calculation of a maximum size of the apertures therein relative to the total area of the surface upon which they are provided because such holes are too small to give rise to concern regarding structural integrity. Therefore, the combinations of Smith and Orefice, and Smith and McCarthy, do not address one of the primary problems addressed and solved by Applicant's invention, namely, that of determining a maximum area of a sidewall that could be occupied by apertures therein without detriment to the structural integrity of the entire structure. As such, neither combination of references addresses or suggests a solution to one of the central problems which Applicant's invention has solved. In view thereof, Applicant's invention would not have been obvious to one of ordinary skill in the art.

Respectfully submitted,
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APPENDIX A

Claims Involved in the Appeal.

(9) Appendix. An appendix containing a copy of the claims involved in the appeal.

APPENDIX B

references

Ex Parte Obiaya, 227 USPQ 58, 60 (BD. Pat. App. & Inter. 1985)

Graham v. John Deere, 383 U.S. 1 at 17 (1966)

In re Bell, 991 F.2d 781, 784, 26 USPQ2d 1529, 1531 (Fed. Cir. 1993)

In re Casey, 152 USPQ 235 (CCPA 1967)

In re Oetiker, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992)

In re Otto, 136 USPQ 458, 459 (CCPA 1963)

In re Reese, 129 USPQ 402 (CCPA 1961)

In re Reven, 156 USPQ 679 (CCPA)

In re Rose, 105 USPQ 237 (CCPA 1955)

In re Woodruff, 919 F.2d 1575, 1577, 16 USPQ2d 1934, 1935 (Fed. Cir. 1990)

U.S. patent number 4,867,328, Sectionized Trash Receptacles, by McCarthy